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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 STATE OF WASHINGTON,

9 Plaintiff,

v.

10 FRANCISCAN HEALTH SYSTEM, et
11 al.,

12 Defendants.

CASE NO. C17-5690 BHS

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING IN
PART AND DENYING IN PART
PLAINTIFF'S MOTION TO
STRIKE PLEADINGS

13 This matter comes before the Court on the State of Washington's (the "State")
14 motion for partial summary judgment (Dkts. 48, 49) and its motion to strike certain
15 affirmative defenses from Defendants' pleadings (Dkt. 105). The Court has considered
16 the pleadings filed in support of and in opposition to the motions and the remainder of the
17 file and hereby (1) denies the State's motion for partial summary judgment and (2) grants
18 in part and denies in part the State's motion to strike pleadings.

19 **I. BACKGROUND**

20 In early September 2016, Defendants Franciscan Health System, Franciscan
21 Medical Group (collectively "Franciscan"), and The Doctors Clinic ("TDC") entered into
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1 a series of agreements. The State claims that Defendants are separate economic entities
2 that entered into an agreement to jointly negotiate the prices for the services they provide
3 to the public. The State asserts that these agreements establish a horizontal price fixing
4 agreement that is *per se* illegal or otherwise constitutes an unreasonable restraint on trade
5 in violation of 15 U.S.C. § 1.

6 **II. DISCUSSION**

7 **A. Motion for Partial Summary Judgment**

8 The State has moved for partial summary judgment on a single element of its
9 claim under 15 U.S.C. § 1. Summary judgment is proper only if the pleadings, the
10 discovery and disclosure materials on file, and any affidavits show that there is no
11 genuine issue as to any material fact and that the movant is entitled to judgment as a
12 matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter
13 of law when the nonmoving party fails to make a sufficient showing on an essential
14 element of a claim in the case on which the nonmoving party has the burden of proof.
15 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for
16 trial where the record, taken as a whole, could not lead a rational trier of fact to find for
17 the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
18 586 (1986) (nonmoving party must present specific, significant probative evidence, not
19 simply “some metaphysical doubt”). *See also* Fed. R. Civ. P. 56(e). Conversely, a
20 genuine dispute over a material fact exists if there is sufficient evidence supporting the
21 claimed factual dispute, requiring a judge or jury to resolve the differing versions of the
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1 truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v.*
2 *Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

3 The determination of the existence of a material fact is often a close question. The
4 Court must consider the substantive evidentiary burden that the nonmoving party must
5 meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
6 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
7 issues of controversy in favor of the nonmoving party only when the facts specifically
8 attested by that party contradict facts specifically attested by the moving party. The
9 nonmoving party may not merely state that it will discredit the moving party’s evidence
10 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
11 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
12 nonspecific statements in affidavits are not sufficient, and missing facts will not be
13 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89 (1990).

14 The issue presently before the Court on summary judgment is whether the State is
15 entitled to a finding as a matter of law that Franciscan and TDC are capable of engaging
16 in a “concerted action” to negotiate reimbursement rates as to qualify as a contract,
17 combination, or conspiracy subject to 15 U.S.C. § 1, or whether they might constitute a
18 single economic unit shielded from scrutiny under § 1. The Court concludes that there
19 remain genuine issues of material fact in this case—whether TDC and Franciscan are
20 separate decision-makers whose conduct is subject to analysis under 15 U.S.C. § 1 is an
21 issue that must be decided at trial.
22

1 Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits “[e]very contract,
2 combination . . . or conspiracy, in restraint of trade or commerce among the several
3 States.” *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991,
4 996 (9th Cir. 2010). In order to state a claim, plaintiff must allege that the defendant (1)
5 engaged in a contract, combination, or conspiracy (2) that unreasonably restrained trade
6 under either a *per se* or rule of reason analysis (3) in a particular market. *American Ad
7 Management, Inc. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996).

8 The meaning of the term “contract, combination . . . or conspiracy”
9 is informed by the “‘basic distinction’” in the Sherman Act “‘between
10 concerted and independent action’” that distinguishes § 1 of the Sherman
11 Act from § 2. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767
12 (1984) (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752,
13 761 (1984)). Section 1 applies only to concerted action that restrains trade.
14 *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 190 (2010). Therefore, in
15 assessing the first element of a valid 15 U.S.C. § 1 claim, “[t]he key is whether the
16 alleged ‘contract, combination . . . , or conspiracy’ is concerted action—that is, whether it
17 joins together separate decisionmakers.” *Id.* at 195. “Section 1, like the tango, requires
18 multiplicity: A company cannot conspire with itself.” *Freeman v. San Diego Ass’n of
19 Realtors*, 322 F.3d 1133, 1147 (9th Cir. 2003) (citing *Copperweld Corp. v. Independence
20 Tube Corp.*, 467 U.S. 752, 769 (1984)). Accordingly, “[i]f two erstwhile competitors
21 combine to become a single economic entity—by merger or acquisition, for example—
22 the act of combination may violate the antitrust laws, but their subsequent relations are
generally immune from section 1.” *Id.* This requirement of multiplicity for the purposes

1 of finding a §1 contract, combination or conspiracy is sometimes referred to as the
2 “single-entity rule.” *See Freeman*, 322 F.3d at 1147.

3 “Whether corporate entities are sufficiently independent requires an examination
4 of the particular facts of each case.” *Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 447
5 (9th Cir. 1993). The Ninth Circuit has recognized several scenarios in which the single-
6 entity rule precludes liability under 15 U.S.C. § 1:

7 It applies to a company and its officers, employees and wholly owned
8 subsidiaries. It also applies to subsidiaries controlled by a common parent,
9 firms owned by the same person, and a firm owned by a subset of the
10 owners of another. It applies to principal-agent relationships and to
11 partnerships or other joint arrangements in which persons who would
12 otherwise be competitors pool their capital and share the risks of loss as
well as the opportunities for profit. *The theme in these cases is economic*
unity. Where there is substantial common ownership, a fiduciary obligation
to act for another entity’s economic benefit or an agreement to divide
profits and losses, individual firms function as an economic unit and are
generally treated as a single entity.

13 *Freeman*, 322 F.3d at 1147–48 (emphasis added). “The relevant inquiry, therefore, is
14 whether . . . [an] agreement deprives the marketplace of independent centers of
15 decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual
16 or potential competition.” *Am. Needle, Inc.*, 560 U.S. at 195 (citations and quotation
17 marks omitted).

18 The State argues that TDC’s and Franciscan’s lack of common ownership alone
19 establishes that they are subject to 15 U.S.C. § 1. Dkt. 49 at 20–22. This is plainly not the
20 case as it ignores the functional analysis to which the Court is obligated to adhere. It has
21 long been established that wholly common ownership results in a “single center of
22 decisionmaking” not subject to 15 U.S.C. § 1. *See Am. Needle, Inc.*, 560 U.S. at 194

1 (citing *Copperweld Corp.*, 467 U.S. at 769). However, the inverse is not true, as there is
2 no precedent stating that lack of common-ownership per se deprives two legally separate
3 entities of economic unity. Instead, the Supreme Court has expressly stated:

4 [C]oncerted action under § 1 does not turn simply on whether the parties
5 involved are legally distinct entities. Instead, we have eschewed such
6 formalistic distinctions in favor of a functional consideration of how the
7 parties involved in the alleged anticompetitive conduct *actually operate*.

8 *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191 (2010) (emphasis added).

9 Emphasizing this functional type of analysis, the Sixth Circuit has recognized that “[t]he
10 question cannot be answered in the abstract as to whether a joint venture [between
11 hospitals] constitutes a single entity incapable of conspiring with itself in an
12 anticompetitive manner, or whether, instead, it becomes a vehicle to facilitate separate
13 entities to conspire illegally to restrain trade.” *Med. Ctr. at Elizabeth Place, LLC v.*

14 *Atrium Health Sys.*, 817 F.3d 934, 937 (6th Cir. 2016). Accordingly, the Sixth Circuit in
15 *Med. Ctr. at Elizabeth Place* held that, read in the light most favorable to the plaintiff, the
16 functional relationship between defendant hospitals and the unity of their economic
17 interests was a genuine dispute of material fact. *Id.* at 945 (“[A] reasonable juror might
18 conclude that, aside from a business relationship pursuant to the joint operating
19 agreement, defendant hospitals maintained separate identities and acted more like
20 competitors than one unit.”).

21 Similarly, the unity of TDC’s and Franciscan’s economic interests and centers of
22 decisionmaking remain a question of fact in this case. Competing testimony has been
submitted regarding the extent to which Franciscan is authorized to or actually does exert

1 control over the operations of TDC through the implementation and enforcement of
2 Franciscan policies and standards. Unlike in *American Needle*, in which professional
3 football teams retained relatively exclusive control over the majority of their regular
4 competitive operations and participated with an even level of control in the joint venture,
5 this case presents a more asymmetrical relationship in which a larger competitor appears
6 to gain a stake in and significant control over a smaller competitor, potentially unifying
7 their economic interest into a single center of financial decisionmaking.

8 Under the Asset Lease Agreement between TDC and Franciscan, Franciscan is
9 leasing all of TDC's assets with the exception of a few specific exclusions, such as
10 corporate seals, minute books, charter documents, accounts receivable prior to the
11 effective date of employee benefit plans, personal property of the physicians and
12 employees, etc. *See* Dkt. 40-1 at 3–4. At the termination or expiration of the agreement,
13 the lease appears to convert to a purchase, and Franciscan will own all tangible assets
14 under the lease at the time of the effective date, and may purchase any other subsequently
15 obtained tangible assets for their original cost less depreciation. *Id.* at 12. Intellectual
16 property will remain the property of TDC. *Id.* at 12–13. Additionally, under an Asset
17 Purchase Agreement, Franciscan outright purchased TDC's ambulatory surgical facility
18 and imaging and laboratory services. *See* Dkt. 108-3 at 10. The Management Services
19 Agreement then charges TDC with providing all of the management services necessary to
20 operate the medical clinics in accordance with industry standards, the annual budget, and
21 numerous Franciscan policies and standards. Those standards include (1) "CHI's
22 Standards and Guidelines pertaining to third party collections procedures;" (2) using the

1 most cost effective resources for supply-chain functions; (3) providing regular
2 accountings of “work Relative Value Unit” (“wRVU”) amounts in a format and level of
3 detail reasonably acceptable to Franciscan; (4) enrollment of medical clinics with
4 Medicare; (5) ensuring that all equipment and the facilities are well-maintained; (6)
5 “[a]dministration of [Franciscan] policies and recommending policies for adoption by
6 [Franciscan]; (7) managing health information in accordance with Franciscan policies and
7 processes; (8) implementing Franciscan corporate responsibility policies; (9) participating
8 in Franciscan business development; (10) “support[ing] Franciscan enterprise-wide
9 development and growth;” and (11) participating in Franciscan quality and risk
10 management initiatives. Dkt. 50-17 at 25–26. Under the Management Services
11 Agreement, TDC, including any shareholder, partner, or member, is barred from
12 providing similar services to a competitor of Franciscan within a geographic region of
13 competition absent Franciscan’s express consent. Dkt. 50-17 at 15–16.

14 The Professional Services Agreement provides that TDC must satisfy the
15 following types of requirements in delivering professional medical services: (1) TDC
16 must be legally qualified to provide the professional services required by the agreement
17 and ensure that its physicians enter into a joinder agreement; (2) TDC’s medical
18 providers must be qualified, properly licensed, and possess the necessary privileges to
19 perform their professional services; (3) TDC must provide services in accordance with
20 “Franciscan policies, procedures and expectations, including but not limited to, those
21 pertaining to quality of care, patient satisfaction, provider engagement and provider
22 collegiality;” (4) TDC must ensure its physicians perform “Medical Director Services”

1 and “Additional Services” according to “applicable Franciscan policies and procedures”;
2 (5) TDC and its providers must provide services exclusively on behalf of Franciscan,
3 with the exception that providers may perform outside of the Franciscan “system” that
4 are prohibited at Franciscan facilities under the Ethical and Religious Directives of the
5 Catholic Church; and (6) TDC must refrain from soliciting any of Franciscan’s patients
6 or employees. Dkt. 50-16 at 5–9.

7 The Professional Services Agreement gives control to Franciscan over whether
8 TDC may hire any new healthcare providers, including physicians or “advanced practice
9 clinicians,” by requiring Franciscan’s written consent. Dkt. 50-16 at 7. Also, Franciscan
10 may unilaterally determine that an additional provider in a given specialty is needed
11 within the applicable hospital’s service area and extend TDC financial assistance for
12 recruitment. *Id.* On the other hand, the Management Services Agreement states that TDC
13 will “recruit, hire, discharge, establish the terms of employment, train, orient, supervise
14 and manage, or otherwise retain the services of all non-clinical and clinical personnel
15 working at the Medical Clinics, other than physicians or other applicable individuals
16 under the PSA.” Dkt. 50-17 at 6.

17 In return for the professional services provided by TDC and its providers,
18 Franciscan is obligated to compensate TDC. Dkt. 50-16 at 11–12. Under the
19 compensation structure, Franciscan pays TDC for professional services at a rate equal to
20 86.5% of the rate Franciscan would pay its own care providers in corresponding
21 specialties for completed wRVUs. *Id.* at 28–29. This rate is subject to annual
22 reconciliation to the extent that the rate results in actual compensation to TDC that

1 exceeds or falls short of 90% of the amounts earned by comparable Franciscan providers
2 in the aggregate. *Id.* Additionally, Franciscan pays TDC the full sum of TDC’s employer
3 share under the Federal Insurance Contributions Act for social security and Medicare
4 deductions, as well as 90% percent of the amount that Franciscan would provide its own
5 employees in comparable positions for health and retirement benefits. *Id.* at 29–30. In
6 turn, TDC is singly responsible for compensating its providers. *Id.* at 13–14. While
7 Franciscan compensates TDC for healthcare professional services at approximately 90%
8 the rate it would pay its own physicians, Franciscan is exclusively in control of setting all
9 billing and fee amounts and negotiating contracts with payors. Dkt. 50-16 at 12.

10 Additionally, under the Management Services Agreement, Franciscan provides
11 TDC with funds pursuant to an annual budget for operating costs negotiated between the
12 parties. Dkt. 50-17 at 11. “[Franciscan] shall have final authority to approve any items on
13 the annual budget to the extent such items are not included [in the agreed budget
14 parameters].” *Id.* “It is the sole and absolute responsibility of TDC to operate within the
15 Budget [Franciscan] and TDC management shall meet monthly to review
16 operations, adherence to the Budget, and other matter as deemed necessary by either
17 Party.” *Id.* Franciscan is also required to compensate TDC each month with a
18 “management fee” equal to 3% of the monthly budget. Dkt. 50-17 at 10, 28. However, if
19 TDC exceeds the budget in an amount greater than the management fee, TDC must
20 forfeit the management fee and then reimburse Franciscan for half of all additional excess
21 costs. Dkt. 50-17 at 28.

1 Beginning in the third year of the parties’ contractual relationship, with one year’s
2 notice, the agreement between Franciscan and TDC is terminable without cause. Dkt. 50-
3 16 at 14. The parties may terminate the agreements immediately for cause. *Id.* at 14–15.
4 If the agreements are terminated, noncompete provisions prohibit the group or any of its
5 physicians from “directly or indirectly participat[ing] in the provision of professional
6 medical services or related administrative services” for a practice with greater than five
7 physicians within the restricted geographic area of competition. Dkt. 50-16 at 8–9. These
8 noncompete conditions do not apply if TDC terminates the agreements for cause. *Id.* at 9.

9 Considering these agreements alone, there is a legitimate argument to be made that
10 TDC and Franciscan are a single economic unit for the purposes of 15 U.S.C. § 1. TDC
11 retains much control over the details of its day-to-day operations, but almost all of TDC’s
12 business appears to generate greater revenues for Franciscan. While TDC retains much
13 control of its day-to-day decisions, the agreements require that the management and
14 professional services delivered by TDC satisfy standards established by Franciscan that
15 bring TDC into conformance with expectations associated with the Franciscan brand.
16 Moreover, some important decisions that involve “big picture” type concerns are reserved
17 for Franciscan, such as whether an additional healthcare provider is needed in any
18 particular specialty or whether any additional providers may be hired. Essentially, while
19 TDC retains wide latitude in controlling the logistics behind how it delivers services on
20 behalf of Franciscan, Franciscan appears to possess the authority to control the standards
21 surrounding the patients’ experience and provides TDC with all of its budget and income.
22 If TDC fails to operate within the established budget, the Management Services

1 Agreement indicates that TDC and Franciscan share any risk associated with TDC's
2 operating failures beyond the forfeiture of TDC's management fee.

3 The Professional and Management Services Agreements also prohibit TDC or its
4 healthcare providers from competing with Franciscan for patients or employees, or from
5 providing any services to competitors, with the exception of services or procedures that
6 Franciscan does not provide in light of its ethical directives. TDC and its providers are to
7 work exclusively on behalf of Franciscan, with the exception of a few specific carve-outs
8 for individual health care providers and services that do not compete with those offered
9 by Franciscan. Furthermore, construing this evidence in the light most favorable to
10 Defendants, under the terms of the contracts, it could appear to a reasonable person that
11 Franciscan has contracted for all of TDC's healthcare services to be packaged and offered
12 under Franciscan's name, as well as ultimate control and decisionmaking of the standards
13 involved with such services.

14 Nonetheless, there is also evidence that TDC and Franciscan continue to compete
15 for patients. It appears that if a patient receives services from TDC, Franciscan will not
16 see the same revenue as if the patient went to a provider employed by Franciscan. There
17 is also substantial evidence that there remains a potential for future competition if TDC
18 and Franciscan end their agreement. While the noncompete provision of TDC's and
19 Franciscan's agreements by default prohibit TDC or its providers from providing health
20 services within the geographic region for a full year after the agreements' expiration or
21 termination, the provision also allows that Franciscan may nonetheless authorize TDC or
22 any physician to continue providing of medical services. Nothing in the agreement

1 appears to prohibit TDC from again competing with Franciscan after that year expires.
2 Further, the Asset Lease Agreement uses permissive rather than mandatory language to
3 describe Franciscan's right to purchase TDC's tangible assets at the termination or
4 expiration of the lease, with the only exception being an obligation to purchase leasehold
5 improvements, which indicates that all assets may revert to TDC after the expiration or
6 termination of the agreements. Dkt. 40-1 at 12.

7 TDC's and Franciscan's agreements could also be construed to indicate that they
8 remain independent financial decisionmakers. The Management Services Agreement
9 expressly describes TDC as an independent contractor, not as an employee or agent. Dkt.
10 50-17 at 19. While TDC's increased revenues appear to directly increase the revenues of
11 Franciscan, TDC and Franciscan retain separate corporate books and records (*see* Dkt.
12 40-1 at 4) and, at the end of the day, their respective profits "don't all wind up under the
13 same corporate mattress." *Freeman*, 322 F.3d at 1149. Also, the Management Services
14 Agreement states: "It is the expectation of [Franciscan] as expressed in this agreement,
15 that TDC will continue to maintain oversight and ongoing operations for its office, clinics
16 and other service locations as mutually agreed upon by TDC and [Franciscan]." Dkt. 50-
17 17 at 26. This indicates that TDC retains significant control over its business and
18 practices—although even under this provision, TDC's oversight of its own operations as
19 an independent contractor appears subject to mutual agreement by Franciscan.

20 Additionally, the agreements are designed to divide and assign certain risks
21 between TDC and FMG rather than to share them. For instance, Franciscan has shifted
22 the risk that payors will not reimburse TDC for a particular procedure by stating that

1 Franciscan must only compensate TDC for “reimbursable” services. *See* Dkt. 50-16 at 28
2 (“[Franciscan] will compensate [TDC] for posted, Reimbursable Professional Services
3 personally performed by the Providers”). Similarly the parties are separately liable
4 for the negligence or misconduct of their agents or employees. *Id.* at 19. Of course, even
5 in the context of a wholly owned subsidiary, which is unequivocally not subject to the
6 analysis of 15 U.S.C. § 1, the entity’s legally separate status can appropriately be invoked
7 to shield the parent from tort liability.

8 Numerous statements in depositions and discovery responses signal contrary
9 views on the functional relationship between Franciscan and TDC. On one hand,
10 Franciscan officers indicate that Franciscan exercises ultimate control over TDC’s
11 budget, Dkt. 109 at 2, and that Franciscan can exert control over all of TDC’s significant
12 business decisions, *see* Dkt. 110. On the other hand, some evidence paints the image of a
13 relationship that “allow[s] [TDC providers] to maintain [their] identity as TDC, choose
14 who [they] want to join [their] group, and take care of [their] patients the way that [they]
15 would like. The only concrete downside is that care that [they] deliver is going to cost
16 [their] patients and their insurance companies more.” Dkt. 50-12 at 2.

17 The Court finds that the functional relationship and economic unity between TDC
18 and Franciscan remains a disputed question of fact that must be resolved at trial.
19 Regardless of the demonstrated strength of the State’s argument, its motion for summary
20 judgment must be denied in light of the competing evidence described above.
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1 **B. Motion to Strike Expert Testimony**

2 The State has moved to strike testimony provided by Kevin M. Kennedy. Mr.
3 Kennedy’s testimony was cited by TDC and Franciscan to argue that a genuine dispute of
4 material fact exists to preclude summary judgment on the legal issue discussed above. To
5 the extent the testimony of Mr. Kennedy is offered as an expert opinion that Franciscan
6 and TDC are a single economic unit, the Court agrees with the State that the testimony
7 fails to satisfy the admissibility requirements of Fed. R. Evid. 702.

8 Whether “CHI [Franciscan] and TDC operate as a single economic entity” is a
9 question to be assessed by examining the underlying facts surrounding the entities’
10 financial and functional relationship. Mr. Kennedy may be qualified to testify as to the
11 typicality of the type of agreement between Franciscan and TDC in the healthcare
12 industry at large. However, while his factual analysis of the relationship between TDC
13 and Franciscan as it relates to industry standards may be admissible, Mr. Kennedy’s
14 opinion on the legal interpretation of whether that relationship constitutes a principal-
15 agent relationship, a single economic unit, or a “contract, combination . . . or conspiracy”
16 for the purposes of 15 U.S.C. § 1 is unhelpful to the trier of fact. As it is presented in his
17 report, Mr. Kennedy’s assertions appear to be mere legal conclusions based on a one-
18 sided interpretation of Defendants’ relationship. The existence of a principal-agent
19 relationship is generally a question of law. Because such opinions would fail to offer any
20 help to the trier of fact beyond suggesting an interpretation of the law, they are
21 inadmissible. *See Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996)
22 (stating that “[e]xpert testimony is not proper for issues of law” because the role of

1 experts is to interpret and analyze factual evidence and not to testify about the law);
2 *Maffei v. Northern Ins. Co. of New York*, 12 F.3d 892, 898–99 (9th Cir. 1993) (holding
3 that an insurance expert’s declaration that sulphur dioxide cloud constituted a “hostile
4 fire” as described in insured’s policies was improper expert testimony); *Aguilar v. Int’l*
5 *Longshoremen’s Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992) (“[M]atters of
6 law . . . [a]re inappropriate subjects for expert testimony”).

7 While proffered expert testimony is not inadmissible simply because it “embraces”
8 an ultimate issue, *see* Fed. R. Evid. 704, “an expert cannot testify to a matter of law
9 amounting to a legal conclusion.” *United States v. Tamman*, 782 F.3d 543, 552 (9th Cir.
10 2015). Accordingly, the Court has considered the testimony of Kevin Kennedy only to
11 the extent that it discusses the use of agreements such as those between Franciscan and
12 TDC in the healthcare industry at large. Insofar as his testimony opines on the legal
13 classification of Franciscan’s and TDC’s affiliation, such testimony has not been
14 considered.

15 **C. Motion to Strike Affirmative Defenses**

16 The State has also moved to strike numerous affirmative defenses from
17 Defendants’ answer. “The court may strike from a pleading an insufficient defense or any
18 redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). Under
19 this rule, a court may grant a motion to strike if a defense “is insufficient as a matter of
20 law.” *FDIC v. Crosby*, 774 F. Supp. 584, 585 (W.D. Wash. 1991). “An affirmative
21 defense is insufficient if as a matter of law it cannot succeed under any circumstances.”
22 *Id.* at 586. Rule 12(f) exists to help “avoid the expenditure of time and money that must

1 arise from litigating spurious issues by dispensing with those issues prior to trial.”

2 *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010).

3 First, the State moves to strike Franciscan’s first and fifth affirmative defenses, as
4 well as TDC’s first, fourth, and sixth affirmative defenses. Dkt. 105 at 2–6. In response,
5 Franciscan and TDC concede that these are not true affirmative defenses, and voluntarily
6 withdraw them. Dkt. 115 at 1–2. However, TDC and Franciscan contest the State’s
7 motion to strike their tenth affirmative defense, which asserts:

8 TDC was as of the date of the transaction with CHI Franciscan a failing
9 company. But for the transaction, TDC would have gone out of business,
10 and its productive assets (including its physicians) would have left the
11 market. Alternatively, even if TDC, or some of its physicians, could have
12 stayed in the market without the transaction, its competitive significance
13 would have been far less than it was before the transactions.

14 Dkt. 89 at 48. *See also* Dkt. 88 at 49. The State argues that the first two sentences of this
15 defense constitute an affirmative “failing-company defense” that is inapplicable to claims
16 under 15 U.S.C. § 1 while TDC and Franciscan argue that the defense is available for
17 claims under 15 U.S.C. § 1. The Court agrees with the State and strikes this affirmative
18 defense.

19 The failing-company defense “applies only if the resources of the acquired
20 corporation are so depleted and the prospect of rehabilitation so remote that it faces the
21 grave probability of a business failure.” 58 C.J.S. *Monopolies* § 115. *See also* *Citizen*
22 *Pub. Co. v. United States*, 394 U.S. 131, 138 (1969). “The burden of proving that the
conditions of the failing company doctrine have been satisfied is on those who seek
refuge under it.” *Citizen Pub. Co.*, 394 U.S. at 138–39. The failing-company doctrine has

1 | been applied successfully only in the context of 15 U.S.C. § 18. Indeed, its mention is
2 | often accompanied in the same breath by its qualification as an exception to 15 U.S.C. §
3 | 18. *See, e.g., United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 555 (1971) (“We
4 | also disagree with the District Court that the acquisition of International by Greater
5 | Buffalo was within the ‘failing company’ exception to § 7 of the Clayton Act.”).

6 | The judicially created affirmative defense is appropriate in the context of 15
7 | U.S.C. § 18 because such claims are focused on a test of whether the effect of an
8 | acquisition “may be substantially to lessen competition, or to tend to create a monopoly.”
9 | 15 U.S.C. § 18; *See Int’l Shoe Co. v. Fed. Trade Comm’n*, 280 U.S. 291, 302–03 (1930).
10 | “[T]he rationale of the failing-company defense is the lack of anticompetitive
11 | consequence if one of the combining companies was about to disappear from the market
12 | at any rate” *U. S. v. Gen. Dynamics Corp.*, 415 U.S. 486, 523 (1974). In contrast, the
13 | test of 15 U.S.C. § 1 examines the existence of an “unreasonable restraint on trade” under
14 | either the rule of reason or per se test, a different concern than the substantial lessening of
15 | competition presented under the Clayton Act. An alleged scheme of horizontal price-
16 | fixing, as alleged by the State, falls into the narrow category of arrangements that are per
17 | se illegal—“they are not evaluated in terms of their purpose, aim or effect in the
18 | elimination of so-called competitive evils.” *United States v. Socony-Vacuum Oil Co.*, 310
19 | U.S. 150, 228 (1940); *see also Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). While an
20 | acquisition subject to analysis under the Clayton Act might be justified to keep the
21 | resources of a failing company from leaving the market altogether by reorganizing them
22 | under the control of a successful business, “the Sherman Act does not permit a failing

1 enterprise to be buoyed up with an illegal agreement to restrain trade.” *Linseman v.*
2 *World Hockey Ass’n*, 439 F. Supp. 1315, 1322 (D. Conn. 1977). If an entity is indeed
3 faced with imminent and certain failure, then some form of acquisition by a successful
4 former competitor may be an appropriate solution to preserve the failing company’s
5 resources in the relevant market; but that does not justify allowing the failing business
6 continue operating through a price-fixing restraint on trade.

7 Finally, the Court notes that the State raises the issue of striking Defendants’
8 “weakened competitor” defense in its reply brief, but offered no substantive basis for
9 striking that defense in its motion. *See* Dkt. 105; Dkt. 121 at 7. At first it blush, it seems
10 apparent that such a defense is irrelevant in this case for the same reason as the failing-
11 company defense. However, the Court will not consider issues raised for the first time in
12 a reply brief. To the extent the State presently seeks to strike Defendant’s “weakened
13 competitor” defense, the request is denied without prejudice.

14 III. ORDER

15 Therefore, it is hereby **ORDERED** that the State’s motion for summary judgment
16 (Dkts. 48, 49) is **DENIED**; its initial motion to strike certain affirmative defenses from
17 Defendants’ pleadings (Dkt. 105) is **GRANTED**; and its request to strike Defendant’s
18 “weakened competitor” defense (Dkt. 121 at 7) is **DENIED**.

19 Dated this 24th day of July, 2018.

20 

21 BENJAMIN H. SETTLE
22 United States District Judge